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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

JEANNE WOODFORD, Petitioner,

v.

BENJAMIN WAI SILVA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DEATH PENALTY CASE

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QUESTIONS PRESENTED

1) Whether it was reasonable for trial counsel to forego a proper investigation for penalty phase purposes of his client's background and mental health, when this purported "decision" is inconsistent with counsel's prior testimony, completely undocumented in his file, contradicted by state court trial records, and refuted by the capital defendant personally?

2) Whether trial counsel's undocumented, last-minute recollection, and self-serving statement that he forewent investigating his client's background in order not to alienate his client, will justify trial counsel's failings?

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STATEMENT OF THE CASE

Respondent adopts the recitals contained in the decision of the court of appeals below.

SUMMARY OF ARGUMENT

In *Silva v. Calderon*, 279 F.3d 825 (9th Cir. 2002) (*Silva*) (App. A), the court of appeals held that the performance of Silva's trial counsel with respect to penalty phase investigation was constitutionally deficient. This holding was the result of a careful, deliberate, and detailed review of the wealth of evidence that trial counsel unjustifiably failed to investigate and present at Silva's penalty trial. The court found that due to trial counsel's deficiencies, Silva's jury did not hear "a raft" of mitigating evidence, and that the result was "profoundly prejudicial" to Silva. *Silva*, at 847, 850; App. A at 68, 76. The court of appeals reached its conclusions by deliberate and even-handed application of this Court's jurisprudence.

This case does not present any cert-worthy questions. Unable to persuade the three judge panel of the court of appeals that unanimously agreed this record established *Strickland* prejudice, and then unable to persuade even a single judge of the court of appeals to vote for a rehearing en banc, the State now turns to this Court. The State is simply dissatisfied with the court of appeals holding and seeks to have this Court serve as a fact-finder. The petition illustrates this clearly time and again by its factual misstatements.

Contrary to the State's contentions, this case does not turn on any per se rule of

reversal, under *Bell v. Cone*, __ U.S. __ (2002 LEXIS 4020, filed May 28, 2002), or otherwise. This case was decided by the lower court after explicit acknowledgment, discussion, and application of this Court's established jurisprudence, specifically including *Strickland v. Washington*, 466 U.S. 668 (1984), and *Williams v. Taylor*, 529 U.S. 362 (2000).

The State nevertheless attempts to create a reason for this Court's review by describing the appellate court's routine application of *Strickland* as a wild deviation that will inevitably open the floodgates of unjustified death sentence reversals. Pet. at 4-5.

In fact, this case involves nothing other than an unremarkable application of *Strickland*. The court of appeals issued its decision based on a careful and thorough review of the facts and evidence presented in the state and federal proceedings in this case, and a reasonable application of those facts to firmly settled law. In its opinion, the court of appeals repeatedly cited the governing cases, analyzed the facts of this case under *Strickland's* performance prong and prejudice prong, and concluded that both prongs were met. Accordingly, Silva was granted relief as to penalty. *Silva*, 279 F.3d at 855; App. A at 94. Contrary to the State's contention, nothing the court of appeals did in this case violates any of this Court's decisions. There is no reason for this Court to grant certiorari or to disturb the judgement of the lower court.

REASONS FOR DENYING THE WRIT

I. This Court Should Deny The State's Petition For Writ Of Certiorari Because Its Reasons For Granting The Writ Are Neither Factually Nor Legally Accurate.

The State professes fear that the court of appeals' decision will "make reversal of the death sentence for ineffective assistance of counsel a virtual certainty in every case." Pet. at 13. The State complains that the court of appeals blazed a new trail when it "acknowledged *Williams*, but then applied its own per se reversal standard." Pet. at 12. In making this assertion, the State ignores the court of appeals' express rejection of a *per se* reversal standard. *Silva*, 279 F.3d at 847, citation omitted, App. A at 67. The State's complaints before this Court are simply unfounded.

Contrary to the State's characterization, what the court of appeals did was nothing other than a standard application of *Strickland* to the facts of this case.[1] After a lengthy discussion of those facts in light of both *Strickland* and this Court's recent decision in *Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("counsel's failure to investigate and present evidence of a defendant's mental defect and social history constitute[d] deficient performance"), the court concluded that trial counsel in this case had rendered deficient performance. *Silva*, 279 F.3d at 846; App. A at 65.

Indeed, the court of appeals conducted an appropriately thorough and exhaustive

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[1] Even if the State's complaint that the court of appeals misapplied *Strickland* were accurate, that complaint remains relatively unavailing in meeting this Court's high bar for granting certiorari. *See* Sup. Ct. R. 10 (Petition for Writ of Certiorari "is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law").

Strickland analysis, spanning fifteen (15) pages of the opinion. *Silva*, 279 F.3d at 836-50; App. A at 28-77. The court began its analysis by discussing the performance prong, noting that trial counsel completely "abandon[ed] investigation into mitigating evidence" supposedly at the direction of his client, but without adequately informing his client of the potential consequences of that decision. *Id.* at 838; App. A at 38. Following that introduction, the court, after repeatedly citing both *Strickland* and *Williams*, concluded that trial counsel's "abandonment of the investigation into Silva's background -- including his family, criminal, substance abuse, and mental health history -- was unreasonable in that it did not meet professional norms prevailing at the time of Silva's trial, and that it therefore amounted to constitutionally deficient performance under the totality of the circumstances." *Id.* at 846; App. A at 65.

After finding deficient performance, the court went on to discuss the prejudice prong. The court began its prejudice analysis by acknowledging that "[a]lthough we do not presume prejudice in a case such as this, we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing." *Silva*, 279 F.3d at 847, citation omitted, App. A at 67. The court, again, after more citations to and discussion of *Williams*, concluded that trial counsel's deficient performance during the penalty phase was "highly prejudicial." *Silva*, 279 F.3d at 850; App. A at 76. After noting that questions from the jurors to the trial judge regarding the meaning of "life without parole" "suggest

that a death sentence for Silva was not a foregone conclusion," the court explained:

> [trial counsel's] failure to investigate Silva's background and to prepare evidence relating to his family history, mental health, and substance abuse problems resulted in an egregious failure to uncover and present a raft of potentially compelling mitigating evidence. Such performance violated norms of reasonableness prevailing at the time of Silva's trial and substantially undermines our confidence in the results of the penalty phase.

Id. at 849-50; App. A at 76-77.

Thus, unlike the State's portrayal of this case as representing a "reversal of a death sentence whenever any new or additional information is uncovered after the trial," this was, in fact, a fully proper penalty phase reversal. The lower court thoroughly studied the record and concluded that trial counsel rendered deficient performance by completely abandoning the investigation into mitigating evidence; in fact, as the lower court noted, trial counsel's deficient performance prejudiced Silva by depriving the jury of "a raft of potentially compelling mitigating evidence." *Silva*, 279 F.3d at 838, 850; App. A at 42, 76.

It can hardly be said that foregoing presentation of "a raft of potentially compelling mitigating evidence" is reasonable and effective representation, or that such a deficiency will be found in every case. It is, however, what occurred in this case, and the court of appeals was justified to recognize that relief was warranted. Even "the California Supreme Court noted in denying Silva's direct appeal, the prosecutor's main argument to the jury during sentencing was the dearth of evidence in mitigation of the crimes. ("The prosecutor emphasized this central point: That nothing mitigated the circumstances of this crime.") (citation omitted) *Silva*, at 830; App. A at 9.

Although the State casts the decision as a remarkable departure from the reasonableness standard of *Strickland*, the court of appeals' analysis amounted to nothing other than a straightforward application of that standard. The State's dissatisfaction with the conclusion in no way alters the fact that the court of appeals conducted a thorough and proper *Strickland* analysis to reach it.

The State tries in various ways to persuade this Court the court of appeals engaged in an irrational misapplication of this Court's case law. For example, the State asserts that the court of appeals has developed a new test, namely that capital trial counsel must find "all" mitigation to avoid being found ineffective. (Pet. 11) This is simply not so. Nowhere in this decision, or any of the other decisions that the State cites, has the court of appeals advanced such a holding.

Seeking to bolster its baseless claim that the court of appeals' decision in this case will require "reversal of the death sentence for ineffective assistance of counsel a virtual certainty in every case" (Pet. at 13; *see also* Pet. at 8), the State cites to *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002) (reversing penalty phase due to ineffective assistance of counsel); *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) (same); *Visciotti v. Woodford*, 288 F.3d 1097 (9th Cir. 2002) (same); and *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002) (remand for evidentiary hearing based on ineffective assistance of counsel at penalty phase). Pet. at 8, n.3. While the State is correct in its description of the outcomes in these cases, the State is incorrect in suggesting that the court of appeals' decisions in those cases were a result of the court of appeals' decision in this case.

Consider *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002). After finding trial counsel's performance deficient under *Strickland*, the court continued on to *Strickland's* second prong and analyzed whether "Caro was prejudiced by his attorney's incompetence." *Caro*, 280 F.3d at 1256, citing *Strickland*, 466 U.S. at 687. Before applying *Strickland's* prejudice prong to the facts of that case, the court, citing both *Strickland* and *Williams*, observed that the relevant inquiry "compels [the court] to couple the omitted evidence with the mitigating evidence presented at trial and reweigh it against the aggravating evidence to determine whether the omitted evidence 'might well have influenced the jury's appraisal of ... [the defendant's] moral culpability.'" *Caro*, 280 F.3d at 1256-57, citing *Williams*, 529 U.S. at 398. With this Court's words as its guide, the court concluded that Caro was, in fact, prejudiced by trial counsel's deficient performance. *Caro*, 280 F.3d at 1258.

The court of appeals was equally diligent in its analysis and review in *Karis*. It thoroughly analyzed for ten (10) pages the facts of the case under *Strickland*, citing both *Strickland* and *Williams*. *Karis*, 283 F.3d at 1132-41. In explaining its conclusion that trial counsel's performance was deficient, the court observed that trial counsel "presented mitigation evidence for only 48 minutes." *Id.* at 1135. Notably absent from this "meager presentation" was "'substantial and wrenching evidence of Karis' violent and abusive childhood" of which trial counsel was aware but utterly unprepared to present due to the lack of a reasonable investigation. *Id.* at 1136, 1139, 1140, citation omitted.

After concluding that Karis' trial counsel rendered deficient performance, the court

found that "[c]ounsel's error in failing to investigate and present the highly relevant information of an abusive childhood was prejudicial." *Karis*, 283 F.3d at 1140. The court explained that the information could have been offered to rebut the prosecutor's "piercing" argument regarding the absence of mitigation. *Id.* The court further observed that "even with the weak mitigation evidence that was presented, the jury was out for three days before rendering its verdict," and that evidence of Karis' violent and abusive childhood would have been important for the jury's "understanding [of] the root of Karis' criminal behavior and his culpability." *Id.* Thus, just like in Silva's case, the court granted penalty relief because trial counsel rendered deficient performance that was prejudicial to his client.

Finally, in *Turner*, the court of appeals simply held that Turner had met the standard for an evidentiary hearing because the record clearly established that trial counsel "was not prepared to begin the penalty phase when the jury returned its verdict of first degree murder. Even the State informed the court that, " 'in all fairness to the defendant,' the defense needed more time to prepare for this phase of trial." *Turner*, 281 F.3d at 894.

The court of appeals remanded for an evidentiary hearing in *Turner* not because it was engaged in any disregard for the law of this Court, but because if Turner's allegations that trial counsel was not prepared to begin the penalty phase and that trial counsel was on notice of, but failed to investigate and present, compelling mitigating evidence regarding Turner's drug use and physical abuse suffered as a child were proven at the evidentiary hearing, deficient performance and prejudice might be established under *Strickland*. *Turner*, 281 F.3d at 890.

The State has cited these decisions from the court of appeals as proof that the decision in this case will "require reversal of a death sentence whenever any new or additional information is uncovered after the trial." Pet. at 8, n.3. In doing so, however, the State failed to perform even a cursory analysis of the reasons behind the results in those decisions. Had the State done so, it would have realized that its basis for seeking the writ, along with the cases it cited in support thereof, were inapposite. The State's petition for writ of certiorari should be denied.

In addition, the State's argument is belied by decisions from the court of appeals since just before and after *Silva*, in which the court explicitly *rejected* claims of ineffective assistance of counsel at the penalty phase due to trial counsel's failure to investigate and present mitigating evidence. *See, e.g., Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002) (mandate stayed by *Pizzuto v. Arave*, 280 F.3d 1217 (9th Cir. 2002) pending this Court's decision in *Ring v. Arizona*); *Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001); *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001) (*reh'g en banc granted by Payton v. Woodford*, 273 F.3d 1271 (9th Cir. 2001); *Anderson v. Calderon*, 232 F.3d 1053 (9th Cir. 2000); *Babbitt v. Calderon*, 151 F.3d 1170 (9th Cir. 1998). Left with little else, the State has resorted to painting the decision in this case as the introduction to lawlessness. This Court, however, should not expend its resources to entertain such sheer desperation. The State's petition for a writ of certiorari should be denied.

In an equally flawed backup stance, the State contends that the "decision's inconsistency with this Court's precedent and conflict with other circuits warrant review by

this Court." Sup. Ct. R. 10(c); Pet. at 13. The State cites no decisions in support of this summarily presented proposition, nor could it do so. The simple fact the State fails to cite even one such case reveals just how hollow the argument is. A reasoned application of this Court's holdings, this decision is squarely in line with the jurisprudence of the other circuit courts of appeal as well.

II. This Court Should Deny The State's Petition For Writ Of Certiorari Because This Court Is Not The Appropriate Forum For Resolving Factual Disputes.

By its own decree, this Court is not the appropriate forum for addressing a claim of erroneous factual findings by a lower court: "[w]e do not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnston*, 268 U.S. 220, 227 (1925); *see NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition; petition presented primarily a question of fact, "which does not merit Court review"); *Rudolph v. United States*, 370 U.S. 269 (1962) (*per curiam*); *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918); Sup. Ct. R. 10 (Petition for Writ of Certiorari "is rarely granted when the asserted error consists of erroneous factual findings").

Indeed, this Court is understandably loathe to review issues of fact. Instead, a Petition for Rehearing and Suggestion for Rehearing en Banc following an adverse decision from the court of appeals is the appropriate vehicle for considering facts "overlooked or

misapprehended . . . ." Fed. R. App. P. 40(a)(2).[2] The State filed such a pleading in this case, and failed to receive a single vote from any of the judges of the lower court. This Court need not become a third court of involvement. *Graver Tank & Mfg. Co v. Linde Air Products*, 336 U.S. 271, 275 (1949).

While advancing trial counsel's testimony for propositions that are alternately factually unfounded or at least controverted, the State never acknowledges that the record in this case provides a wealth of contradictory evidence, all of which buttressed the court of appeals' decision. The portion of trial counsel's testimony on which the State relies is inconsistent with trial counsel's own prior testimony. Trial counsel's billing records reveal a stunning lack of work in this case, and his understanding - both at the time of Silva' trial and during his deposition in this matter - of this Court's capital case law was abjectly low. Unaware himself of even the bifurcated structure of California's death penalty statute, trial counsel was not able to explain it to Silva let alone advise Silva why he should conduct an investigation in Silva's background. As the court of appeals' decision reflects, trial counsel's bare statements to the contrary were flatly contradicted by extensive extrinsic and contemporaneous records.

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[2] The State's only success was with the district court. It is notable, however, that the district court first formulated its strongly held views without affording Silva the benefit of an evidentiary hearing or discovery; indeed without affording Silva any of the procedural benefits guaranteed under Title 28. *Silva*, at 830; App. A at 11. Later, after extensive proceedings and once the district court had finally afforded Silva those protections, it nevertheless proceeded to disregard all of the evidence Silva produced, opting instead to all but effectively republish the decision it originally promulgated at the beginning of the proceedings. The court of appeals did not behave in such a rash manner. It reviewed the full record before formulating a view of this matter.

It is a significant misstatement for the State to contend that Silva "personally command[ed] that his appointed counsel not contact either of his parents for an investigation of possible mitigation evidence for the penalty phase and couple[d] that directive with a threat to do something in front of the jury to make the jury hate him." (Petition, i) Even trial counsel's own testimony does not sustain this point. Before the California Supreme Court, trial counsel testified - under oath - to a significantly different effect, asserting only that Silva asked him not to call his parents as witnesses. The false contention that Silva threatened to disrupt courtroom proceedings did not surface until years after the trial court proceedings. None of these crucial points were documented anywhere in trial counsel's file, they were not addressed during the trial court proceedings, and they are inconsistent with Silva's contemporaneous complaint to the trial court that counsel was not preparing his case and that he wanted to have new counsel appointed to handle the case who would dedicate time to it. Essentially, the State ignores all of this in its unreasoned attempt to have this Court review this case. What the State really wants is for this Court to revisit disputed factual points.

The petition projects the impression that the court of appeals somehow "substitute[d] its own version of events where the testimony in question turns on an issue of credibility resolved by the district court." (Petition, i) While it is true there are factual questions the district court answered differently than the court of appeals,[3] the State does

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[3] The court of appeals' decision is not even based on those disputed points. Even trial counsel agrees he did not obtain a wealth of information available to him from sources other than Silva's

not disclose to this Court that both of the lower courts were operating on the *exact* same information. There was no live testimony presented to the district court; that court made no factual findings by assessing a witness's demeanor or other indicia of credibility. Trial counsel's extensive deposition was videotaped, and those tapes were before both the district court and the court of appeals. Both courts had the benefit of the exact same sources of information. The decision makes clear the court of appeals was well aware of the findings that the district court had made. *Silva*, at 837; App. A at 32-35. When the court of appeals rejected the district court's findings, it did so properly. The court of appeals acknowledged the proper standard for reviewing findings of fact made in the district court (clearly erroneous) and recognized that it must accept those factual findings absent a "definite and firm conviction that a mistake has been committed.". *Silva*, at 835; App. A at 26.[4] There is nothing improper or cert-worthy in these developments.

Contrary to the State's assertions, there was no relationship between trial counsel and Silva that trial counsel was trying to protect. (Pet., 10) Indeed, the record establishes that the opposite was true. Even then Silva was unhappy because trial counsel was not preparing his case for trial.

> At this time I'd like to make a motion to have my lawyer dismissed. I feel he's not competent as my lawyer, doesn't have my best interest at heart. It took me a while to see it, and I know it's probably, you know, the court's

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parents. As the lower court found, trial counsel was derelict and his testimony was disingenuous.

[4] A prime example: "The district court's conclusion that Mr. Silva had clearly directed Buckwalter not to investigate his family background is not fairly supported by evidence in the record." *Silva*, at 839; App. A at 40.

> wondering why it took so long. But, you know, he's just not doing his job to the best of his ability and this case is a death sentence case and I feel it's important that I have a competent lawyer to handle it.

(RT 8/5/81, 1) All concerned would have been better served had the trial court heeded Silva's complaint then. The court of appeals decision rectifies the wrong that occurred during these proceedings. The judgment should not be disturbed.

CONCLUSION

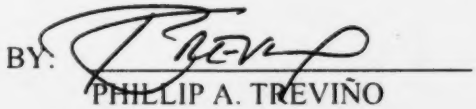
This case involves a court of appeals' proper and diligent application of this Court's clearly established precedent set forth in *Strickland* and related cases. Far from "establish[ing] both performance and prejudice tests that are fundamentally at odds with *Strickland*," the court of appeals cited *Strickland*, applied its two-part test, and concluded that on the facts of this case, both the performance prong and the prejudice prong were met.

This case is another sad compilation of unhappy and tragic events. Silva's sad, abusive, and challenged childhood; his mental health concerns that were left untreated from childhood; and a violent criminal episode. Silva was then saddled with an ineffectual trial lawyer, who failed him utterly.

There are no cert-worthy questions presented here and this Court should not disturb the judgment of the lower court. The petition for writ of certiorari should be denied.

DATED: August 5, 2002

Respectfully submitted,

BY: 

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